

Tenth Supplement to Memorandum 94-11

Administrative Adjudication: Exemption Request of Department of Social Services

Attached is a letter from the Department of Social Services requesting a partial exemption from the proposed new Administrative Procedure Act. The exemption would apply to its hearings on state-supervised, county-administered welfare and services programs under Sections 10950-10967 of the Welfare and Institutions Code, also attached. These hearings are now exempt from the APA. Welf. & Inst. Code § 10953.

The APA does presently apply to the department's licensing of community care facilities, residential care facilities for the elderly, and child day care facilities. Health & Safety Code §§ 1526, 1551, 1558, 1569.22, 1569.51, 1569.58, 1596.887, 1596.8897. The department is not seeking exemption for these hearings.

For public social services hearings, the department says the proposed new APA would make the present informal hearings more formal, imposing new burdens and costs. The department has the same concern as the Unemployment Insurance Appeals Board that many of its procedures are mandated by federal regulations. This problem would be most acute where federal regulations conflict with the APA in areas that cannot be modified by agency regulations.

The statutes provide that a dissatisfied applicant for public social services may request and must be given a "fair hearing." Welf. & Inst. Code § 10950. The hearing must begin within 30 working days after the request and notice must be given at least 10 days before the hearing. *Id.* § 10952. If the agency writes a position statement on the issues at the hearing, a copy must be given to the applicant at least two working days before the hearing, or the hearing shall be postponed if the applicant so requests and waives the deadlines that would apply under regulations. *Id.* § 10952.2. The hearing is conducted in an "informal manner" to "encourage free and open discussion by participants." *Id.* § 10955. Continuances may not exceed 30 days. *Id.* § 10957.

In contrast, the new APA requires issuance of an initial pleading within 90 days of the application, time is allowed for a responsive pleading, the agency determines the time of the hearing, and there is no maximum limit on the length

of continuances. Proposed Gov't Code §§ 642.240, 642.310, 642.350, 642.410, 642.420. The informality of the social services hearing is approximated by the conference hearing procedure under the new APA. This is a simplified administrative adjudication involving no prehearing conference or discovery, and the presiding officer may limit witnesses, testimony, evidence, rebuttal, and argument. Cross-examination is ordinarily not permitted.

It seems apparent that most of the substance of Welfare and Institution Code Sections 10950-10967 must be preserved to permit the department to continue to comply with federal mandates. The department notes that it may "opt out of some, but not all" APA provisions. Under the proposed new APA, agency regulations cannot modify the provisions for issuance, review, and implementation of decisions. This subject is now covered by Sections 10959-10961 of the Welfare and Institutions Code. The question is whether the end result will be a confusing hodge-podge of APA and Welfare and Institutions Code provisions and department regulations, as the department asserts.

The necessity of the Department of Social Services complying with federal regulations is similar to that of the Unemployment Insurance Appeals Board. The staff thought the concerns of the UIAB could be addressed by using the conference hearing procedure and by UIAB regulations to modify or make inapplicable much of the new APA. See 12th Supp. to Memo 94-11. In the case of the Department of Social Services, the additional factor of a fairly complete existing statutory scheme makes its exemption request more compelling. Accordingly the staff would preserve Section 10953 of the Welfare and Institutions Code without revision:

Welf. & Inst. Code § 10953 (unchanged). Conduct of proceedings

~~10953. A hearing under this chapter shall be conducted by~~
administrative law judges employed by the department, unless the director orders that it shall be conducted by himself or herself. However, the director may contract with the Office of Administrative Hearings to conduct hearings.

Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code shall not apply to any hearing conducted under this chapter.

Respectfully submitted,

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Staff Counsel

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Law Revision Commission
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File: _____
Key: _____

October 6, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Comments on Tentative Recommendation
on Administrative Adjudication

Dear Mr. Sterling:

The Department of Social Services (Department) had previously expressed its views as to the tentative recommendation primarily as it related to administrative hearings involving the Department in the Community Care Licensing program. The comments specifically did not address hearings currently conducted by this Department concerning the receipt of public social services under the provisions of Chapter 7 (commencing with Section 10950) of Part 2 of Division 9 of the Welfare and Institutions Code. For the reasons explained more fully below, the Department strongly recommends that such hearings be exempted from the requirements as tentatively recommended. However, since a major defect of the current law governing administrative hearing procedures has been identified as its inaccessibility, the Department suggests that its hearing procedures be published in the California Code of Regulations in addition to the Department's Manual of Policies and Procedures. The Department is currently exempt from the requirement to publish in the California Code of Regulations its public social service regulations by the provisions of Welfare and Institutions Code Section 10554. The APA could be revised to contain a statutory reference to that fact thus assuring that the Department's procedures would be readily accessible to all.

The procedures governing hearings involving public social services found at Section 10950 et seq. and in regulations of the Department in Division 22 of its Manual of Policies and Procedures have been enacted to comply with the requirements of federal law (see for example 45 CFR 205.10 concerning the Aid to Families with Dependent Children) and constitutional law originally set out in the landmark case of Goldberg v. Kelly

(1970) 397 U.S. 254 as to the right to an evidentiary hearing prior to the termination of benefits. The Department's hearing system processes almost 6,000 requests for hearings each month in programs such as Aid to Families with Dependent Children, Food Stamps, In Home Supportive Services and Foster Care. In all of these cases, an applicant or recipient of public social services is contesting an action involving the receipt of cash assistance or services which is most often critical to the ability of the recipient to obtain the very means to subsist, i.e., food, shelter, and other necessities of life.

These administrative hearings are conducted by the more than 50 Administrative Law Judges employed by the Department. The parties are the county that took the action and the "claimant", the applicant for or recipient of public social services. The claimants are frequently unrepresented and unsophisticated. The hearing system has been established to provide as speedy and informal a hearing process as possible to enable the claimant to participate most effectively. The Department does not wish to make its hearing process any more formal than it currently is which would be the result of the tentative recommendation. To do so could only have an adverse effect on a claimant's ability to understand and participate in a meaningful way in the hearing process. A more formal hearing system would also impose new burdens, and costs, on the counties. As a new mandate, the state would be responsible for absorbing the increased costs.

The tentative recommendation does allow the Department to opt out of some, but not all, of the provisions of the APA. In our view, however, this is not a reasonable solution for the Department. The Department would have to adopt new regulations which could be very costly and time consuming with the end result being the same regulations the Department has previously promulgated through the rule making procedures of the Administrative Procedure Act. No purpose is served by this process and the net result is a hodge-podge of APA and Department regulations that will be confusing to read and apply.

The Department's regulations are, to a great extent, required by federal law. As federal law changes in this area so must the Department. If the Department is not exempted from the tentative recommendation there is a potential for a future compliance issue if it falls within an area of the APA with which the Department has to comply and cannot modify.

Another reason that makes the APA inappropriate for these hearings is that the process is so different than the typical APA situation. The Department's programs are administered at the county level under state supervision. The county initiates the process through a notice of action to the applicant or recipient who, if dissatisfied with the county action, can request an

administrative "fair hearing". This process cannot be easily fit into the proposed APA and attempting to do so would most likely result in a confusing mix of procedures and terminology.

Many of the problems identified by the Commission to justify application of the APA to all state agencies are not applicable to this Department. The Department's procedures have been formally adopted through the APA rule making procedures and thus subject to public comment and OAL review. All applicants for and recipients of public assistance are made aware of their right to a fair hearing in every notice of action they receive. In addition, there is an active legal aid community that does not hesitate to inform, or challenge, the Department when it believes we are not complying with the law as it relates to the hearing rights of welfare recipients.

However, there is one defect that has been identified, accessibility to the hearing procedures, which does have some validity to this Department. Our regulations are readily accessible to those who are somewhat familiar with the system. A new practitioner, though, may have to spend some time tracking down the regulations which are not maintained by most law libraries. We believe this defect can be easily remedied by a statutory requirement that the Department publish its hearing regulations in their entirety in the California Code of Regulations as well as in its Manual of Policies and Procedures. Since the CCR is maintained by most libraries and is the logical first place to look for hearing procedures, the regulations would be readily accessible to all. A statutory reference in the APA and in the Welfare and Institutions Code would guide the practitioner to the CCR.

While the Commission has done a commendable job in identifying significant problems with the current state of administrative hearing procedures, most of them are not applicable to the hearing system for public social services and the unique nature of this hearing system argues strongly for it being kept separate and distinct. We believe our proposal for concurrent publication in the CCR will resolve the one significant deficiency with the Department's regulations.

We thank you for the opportunity to respond to the Commission's proposal and apologize for the lateness of our comments. We hope that you will give them serious consideration.

Sincerely,



LAWRENCE B. BOLTON
Chief Counsel
Legal Division

Exhibit

Statutes on Hearings on Receipt of Public Social Services

Welf. & Inst. Code § 10950. Right to hearing; filing request

10950. If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his or her application for or receipt of public social services, if his or her application is not acted upon with reasonable promptness, or if any person who desires to apply for public social services is refused the opportunity to submit a signed application therefor, and is dissatisfied with that refusal, he or she shall, in person or through an authorized representative, without the necessity of filing a claim with the board of supervisors, upon filing a request with the State Department of Social Services or the State Department of Health Services, whichever department administers the public social service, be accorded an opportunity for a state hearing.

Priority in setting and deciding cases shall be given in those cases in which aid is not being provided pending the outcome of the hearing. This priority shall not be construed to permit or excuse the failure to render decisions within the time allowed under federal and state law.

Notwithstanding any other provision of this code, there is no right to a state hearing when either (1) state or federal law requires automatic grant adjustments for classes of recipients unless the reason for an individual request is incorrect grant computation, or (2) the sole issue is a federal or state law requiring an automatic change in services or medical assistance which adversely affects some or all recipients.

For the purposes of administering health care services and medical assistance, ~~the State Director of Health Services shall have those powers and duties conferred~~ on the Director of Social Services by this chapter to conduct state hearings in order to secure approval of a state plan under applicable federal law.

The State Director of Health Services may contract with the State Department of Social Services for the provisions of state hearings in accordance with this chapter.

As used in this chapter, "recipient" means an applicant for or recipient of public social services except aid exclusively financed by county funds or aid under Article 1 (commencing with Section 12000) to Article 6 (commencing with Section 12250), inclusive, of Chapter 3 of Part 3, and under Article 8 (commencing with Section 12350) of Chapter 3 of Part 3, or those activities conducted under Chapter 6 (commencing with Section 18350) of Part 6.

Welf. & Inst. Code § 10951. Time for filing request

10951. No person shall be entitled to a hearing pursuant to this chapter unless he files his request for the same within 90 days after the order or action complained of.

Welf. & Inst. Code § 10952. Time for hearing; notice

10952. The department shall set the hearing to commence within 30 working days after the request is filed, and, at least 10 days prior to the hearing, shall give all parties concerned written notice of the time and place of the hearing.

Welf. & Inst. Code § 10952.5. Availability of position statement

10952.5. If regulations require a public or private agency to write a position statement concerning the issues in question in a fair hearing, or if the public or private agency chooses to develop such a statement, not less than two working days prior to the date of a hearing provided for pursuant to this chapter, the public or private agency shall make available to the applicant for, or recipient of, public social services requesting a fair hearing, a copy of the public or private agency's position statement on the forthcoming hearing. The public or private agency shall make the copy available to the applicant or recipient at the county welfare department. A public or private agency shall be required to comply with the provisions of this section only if the public or private agency has received a 10-day prior notice of the date and time of the scheduled hearing.

If the public or private agency does not make the position statement available not less than two working days prior to the hearing or if the public or private agency decides to modify the position statement, the hearing shall be postponed upon the request of the applicant or recipient, provided an applicant or recipient agrees to waive the right to obtain a decision on the hearing within the deadline that would otherwise be applicable under regulations. A postponement for reason of the public or private agency not making the position statement available within not less than two working days shall be deemed a postponement for good cause for purposes of determining eligibility to any applicable benefits pending disposition of the hearing.

For purposes of this section "public or private agency" shall not include the State Department of Health Services.

Welf. & Inst. Code § 10953. Conduct of hearing

10953. A hearing under this chapter shall be conducted by administrative law judges employed by the department, unless the director orders that it shall be conducted by himself or herself. However, the director may contract with the Office of Administrative Hearings to conduct hearings.

Chapter 5 (commencing with Section 11500 of Part 1 of Division 3 of Title 2 of the Government Code shall not apply to any hearing conducted under this chapter.

Welf. & Inst. Code §10953.5. Appointment and qualifications of administrative law judges

10953.3. (a) The director has authority to appoint the department's administrative law judges as provided in Section 10555.

(b) Each administrative law judge shall have been admitted to practice law in this state and shall possess any other qualifications prescribed by the State Personnel Board. All persons in the office of the chief referee employed as hearing officers by the department prior to the effective date of this section shall be deemed to be administrative law judges.

Welf. & Inst. Code §10954. Application of powers of head of department

10954. The director or administrative law judge conducting the hearing, shall have all of the powers and authority conferred upon the head of a department in Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

Welf. & Inst. Code §10955. Informal hearing

10955. The hearing shall be conducted in an impartial and informal manner in order to encourage free and open discussion by participants. All testimony shall be submitted under oath or affirmation. The person conducting the hearing shall not be bound by rules of procedure or evidence applicable in judicial proceedings. At the hearing the applicant or recipient may appear in person with counsel of his own choosing, or in person and without such counsel.

Welf. & Inst. Code §10956. Report of proceedings

10956. The proceedings at the hearing shall be reported by a phonographic reporter or otherwise perpetuated by mechanical, electronic, or other means capable of reproduction or transcription.

Welf. & Inst. Code §10957. Continuance

10957. The person conducting the hearing, upon good cause shown, may continue the hearing for a period of not to exceed 30 days. When the refusal of a county to accept a signed application for aid or services is an issue, the director may require the county to accept the application, and may continue the case until the results of the investigation have been reported to him or her. In any such case in which aid is awarded by the director or his or her designee, the payments shall commence at the time indicated by the director or his or her designee.

Welf. & Inst. Code §10958. Proposed decision

10958. If the hearing is conducted by an administrative law judge, he or she shall prepare a fair, impartial, and independent proposed decision, in writing and in such format that it may be adopted as the director's decision and, after approval of the decision by the chief administrative law judge of the department, the chief administrative law judge shall file a copy of the proposed decision, within 75 days after the conclusion of the hearing, with the director.

Welf. & Inst. Code §10958.1. Issues at hearing

10958.1. The issues at the hearing shall be limited to those issues which are reasonably related to the request for hearing or other issues identified by either party which they have mutually agreed, prior to or at the hearing, to discuss. All of those issues shall be addressed in the hearing decisions.

Welf. & Inst. Code § 10959. Director's decision; service; further hearings

10959. Within 30 days after the department has received a copy of the administrative law judge's proposed decision, the director may adopt the decision in its entirety; decide the matter himself or herself on the record, including the transcript, with or without taking additional evidence; or order a further hearing to be conducted by himself or herself, or another administrative law judge on behalf of the director. Failure of the director to adopt the proposed decision, decide the matter himself or herself on the record, including the transcript, with or without taking additional evidence or order a further hearing within the 30 days shall be deemed an affirmation of the proposed decision. If the director decides the matter, a copy of his or her decision shall be served on the applicant or recipient and on the affected county, and, if his or her decision differs materially from the proposed decision of the administrative law judge, a copy of that proposed decision shall also be served on the applicant or recipient and on the affected county. If a further hearing is ordered, it shall be conducted in the same manner and within the same time limits specified for the original hearing.

Welf. & Inst. Code § 10960. Request for rehearing

10960. Within 30 days after receiving the proposed decision of an administrative law judge adopted by the director, a final decision rendered by an administrative law judge or a decision issued by the director himself or herself, the affected county or applicant or recipient may file a request with the director for a rehearing. The director shall immediately serve a copy of the request on the other party to the hearing and such other party may within five days of the service file with the director a written statement supporting or objecting to the request. The director shall grant or deny the request no earlier than the fifth nor later than the 15th working day after the receipt of the request. If the director grants the request, the rehearing shall be conducted in the same manner and subject to the same time limits as the original hearing. If action is not taken by the director within the time allowed, the request shall be deemed denied.

Welf. & Inst. Code § 10961. Specification of award; payment

10961. The decision of the director need not specify the amount of the award to be paid unless the amount of the award is an issue. If the decision is in favor of the applicant or recipient, the county department shall pay to the applicant or recipient, without the necessity of establishing his or her present need, the amount of aid the director finds he or she is entitled to receive pursuant to the director's decision,

payment to commence as of the date the person was first entitled thereto, or grant to him or her the services to which he or she is entitled.

The award shall be determined no later than 30 days following the date that the hearing decision is received by the county, or 30 days from the date the additional information needed for compliance with the decision is provided to the county. After the award is made, the county and the claimant shall be notified by the department of its determination regarding the county's compliance with the decision.

Welf. & Inst. Code § 10962. Judicial review

10962. The applicant or recipient or the affected county, within one year after receiving notice of the director's final decision, may file a petition with the superior court, under the provisions of Section 1094.5 of the Code of Civil Procedure, praying for a review of the entire proceedings in the matter, upon questions of law involved in the case. Such review, if granted, shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision. The director shall be the sole respondent in such proceedings. Immediately upon being served the director shall serve a copy of the petition on the other party entitled to judicial review and such party shall have the right to intervene in the proceedings.

No filing fee shall be required for the filing of a petition pursuant to this section. Any such petition to the superior court shall be entitled to a preference in setting a date for hearing on the petition. No bond shall be required in the case of any petition for review, nor in any appeal therefrom. The applicant or recipient shall be entitled to reasonable attorney's fees and costs, if he obtains a decision in his favor.

Welf. & Inst. Code § 10963. Compliance with and execution of director's decision

10963. The county director shall comply with and execute every decision of the director rendered pursuant to this chapter.

Welf. & Inst. Code § 10964. Digest of decisions

10964. The department shall compile and distribute to each county department a current digest of decisions, properly indexed, rendered under this chapter, and each such digest shall be open to public inspection, subject, however, to the confidentiality requirements set forth in federal and state laws and regulations.

Welf. & Inst. Code § 10965. Request for hearing by legal representative or heir

10965. Nothing in this chapter shall prevent the filing of the request for a hearing by the legal representative, or, if there is no authorized legal representative, by an heir of a deceased applicant or recipient, in behalf of the decedent's estate, to the end that rights not determined at the time of death shall accrue to the estate of the applicant or recipient.

Welf. & Inst. Code § 10966. Delegation of authority to adopt final decisions

10966. (a) In addition to any other delegation powers granted to the director under law, the director may delegate his or her powers to adopt final decisions under this chapter to all administrative law judges within specified ranges in the department, in the types of cases deemed appropriate by the director. The authority to adopt final decisions shall not be contingent upon the outcome of the judge's resolution of the case or issue, nor upon the identity of a particular administrative law judge. The defined areas of delegation shall be published by the department after interested groups such as the Coalition of California Welfare Rights Organizations, legal aid societies, and the County Welfare Directors Association have had a reasonable amount of time to review and comment.

(b) Notwithstanding any other provisions of this chapter, decisions rendered by the administrative law judges under the authority of this section shall be treated, for all purposes, as the decision of the director. The affected county, recipient, or applicant has the right to request a rehearing pursuant to Section 10960, and the right to petition for judicial review pursuant to Section 10962.

(c) If the director chooses to exercise the authority to delegate his or her powers to adopt final decisions to administrative law judges, the delegation shall be in writing. Any such delegation instrument shall be a public record available at all times, including the time of hearing, from each administrative law judge to whom that authority has been delegated. The written delegation instrument shall include paragraphs (1) and (2) of the following, and may include paragraph (3) of the following:

(1) It shall specify the administrative law judges that are authorized to render final decisions on his or her behalf, including the effective date of the authorization.

(2) It shall specify the types of cases or issues that are subject to his or her delegation of final authority.

(3) It may include any other implementation instructions which he or she determines are necessary for the effective implementation of this section.

(d) Decisions rendered by administrative law judges pursuant to the provisions of this section shall be fair, impartial, independent, in writing, and in the format prescribed by the Chief Administrative Law Judge.

Welf. & Inst. Code § 10967. Adequacy of county's notice of action as issue

10967. At the time of the hearing the recipient has a right to raise the adequacy of the county's notice of action as an issue. If the administrative law judge determines that adequate notice was provided, the recipient shall agree to discuss the substantive issue or issues or the case shall be dismissed. If the administrative law judge determines that adequate notice was not provided, the case will be postponed unless the recipient waives the adequate notice requirement and agrees to discuss the substantive issue or issues at the hearing. If the notice was not

adequate and involved termination or reduction of aid, retroactive action shall be taken by the county to reinstate aid pending.